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Supreme Court of the United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state government's removal of the Boy Scouts from a forum in which they had participated for 30 years because of the Scouts' moral viewpoint and leadership policies unconstitutionally interferes with freedom of expressive association under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and discriminates on the basis of viewpoint under *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioners Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America.

2. Respondents Nancy Wyman, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, Carol Carney, in her capacity as Chair of the Connecticut State Employee Campaign Committee, and Margaret Diachenko, Richard Emonds, Paluel Flagg, Christine Fortunato, Burton Gold, Carol Guiliano, Carol Hamilton, Marilyn Kaika, Joan Kelly-Coyle, D'ann Mazzocca, Bernard McLoughlin, Michael Nichols, William Philie, Cheryl Sawina and Noel Thomas, in their capacities as members of the Connecticut State Employee Campaign Committee, and Connecticut Commission on Human Rights and Opportunities.

Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters as local Councils more than 300 not-for-profit corporations such as Connecticut Rivers Council to support Boy Scouting and other Scouting programs in localities nationwide.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit (1a-34a)[1] is reported at 335 F.3d 80 (CA2 2003). The decision of the United States District Court for the District of Connecticut (35a-54a) is reported at 213 F. Supp. 2d 159 (D. Conn. 2002).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 9, 2003. The order denying Boy Scouts' petition for rehearing and rehearing en banc was entered on August 26, 2003. On November 12, 2003, Justice Ginsburg extended the time to file a petition for a writ of certiorari until December 24, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the First and Fourteenth Amendments to the United States Constitution:

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1. Numbers followed by "a" refer to pages in the bound Appendix submitted with this Petition. Numbers preceded by "A" refer to pages in the Joint Appendix submitted to the Court of Appeals.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I.
>
> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

The pertinent sections of the United States Code, 42 U.S.C. § 1983, the Connecticut General Statutes, title 46a, sections 71, 74, 76, 81a, 81i, 81l, 81n, and 81r, and Connecticut State Agencies Regulations section 5-262-3 are reprinted in the Appendix to this Petition.

STATEMENT OF THE CASE

This case concerns the decision by the State of Connecticut to remove local Boy Scout councils from a State employee charitable campaign ("the Campaign") in which 900 charities with diverse missions and constituencies participate. The State does not fund the operation of the Campaign. (5a, A 71, A 132, A 289 at 130-32.) The State simply provides the opportunity for private groups to describe themselves in a Campaign Directory and to receive donations through payroll deductions from State employees who choose to donate. (5a, A 70-71, A 132, A 87-88, A 113.)

Boy Scout councils had participated in the Campaign for 30 years before Connecticut removed them. (6a, A 733-34.) In 1999, prior to this Court's decision in *Boy Scouts of*

America v. Dale, 530 U.S. 640 (2000), State officials considered removing the Boy Scouts on the theories that the Boy Scouts violated State nondiscrimination law and that the State itself engaged in unlawful discrimination by including the Boy Scouts in the Campaign (A 578); post-*Dale*, State officials determined that State law prohibiting the State from engaging in discrimination required the exclusion of the Boy Scouts from the Campaign. (A 603-21.)

The court of appeals recognized that the Boy Scouts' policies were "constitutionally protected" under *Dale*. (18a.) The court nonetheless upheld Connecticut's removal of the Boy Scouts from the charitable forum on the ground that Connecticut had not forced the Boy Scouts to change their viewpoint on homosexual conduct (19a), but merely required the Boy Scouts to "pay[] a price" for "exercising its First Amendment rights." (26a n.8.) The Boy Scouts seek review of this ruling.

1. *Boy Scouts of America and Connecticut Rivers Council ("Boy Scouts").* Boy Scouts of America is "a private, not-for-profit organization engaged in instilling its system of values in young people." *Dale*, 530 U.S. at 644. More than 2.5 million youth members and one million adult leaders are active in Cub Scout, Boy Scout and Venturing groups. More than 300 Scouting councils, including the Connecticut Rivers Council, support local Scouting in the United States. (A 733.) The councils are financially self-sustaining: apart from camping and activities fees, they rely on charitable donations. (A 68, A 130, A 733-34.) Without funds from campaigns such as Connecticut's, local councils would be forced to cut Scouting programs to youth. (A 734.)

Connecticut Rivers Council serves 23,900 youth through 8,200 leaders in six counties of Connecticut. (A 733.) Three other local councils in Connecticut also had participated in the Campaign before being excluded. (6a, A 733-34.)

The Boy Scouts are among the most diverse youth groups in the country, involving boys of every race, creed, and economic circumstance. All Scouts are asked to follow the Scout Oath and Law, which embody traditional values. *See Dale*, 530 U.S. at 649. The Scout Oath includes the obligations to do one's "duty to God" and to be "morally straight." (A 732.) By reason of these values, the Boy Scouts do not accept atheists or agnostics, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993), or avowed homosexual leaders, *see Dale*, 530 U.S. at 653-54.

2. *The Campaign.* Connecticut holds an annual Campaign in which State employees may donate to any of 900 "charitable and public health, welfare, environmental, conservation, and service" groups. Conn. Gen. Stat. § 5-262(a)(3) (1998), (5a, A 70, A 132, A 725.) The charities describe themselves in a Directory distributed to State employees. (A 537-77, A 648-725.) The State Employees' Campaign Committee ("Campaign Committee") administers the Campaign, but the charities bear the costs of the Campaign. (5a, A 71, A 132, A 289 at 130-32.)

The included charities are as diverse as the Campaign's description suggests. They range from ethnic and religious associations, advocacy groups, and organizations devoted to the special interests of various

categories of persons to traditional service organizations. The Directory descriptions, which are required to be accurate, *see* Conn. Gen. Stat. § 21a-190h (1998), include charities such as Catholics for a Free Choice ("pro-choice organization of Catholics"), La Casa De Puerto Rico (group furthering "social, economic and political well being of the Puerto Rican community"), Girl Scouts Council of Southwestern Connecticut (group "for girls age 5-17"), the Indian Law Resource Center (an "Indian organization providing free legal help to Native American tribes"), and the Fellowship of Christian Athletes (group reaching "students for Jesus Christ"). (A 546, A 669; A 555; A 683; A 671; A 569.)

The Campaign includes gay rights advocacy and legal defense organizations. The Directory entry for the Stonewall Foundation states that it "[i]mproves attitudes" toward homosexuality and "educates on behalf of lesbian, gay, bi-sexual, transgendered people." (A 567, A 709.) The Stonewall Foundation does not allow persons opposed to the gay rights agenda to "speak" for it or "represent" it. (A 353 at 67-68.) Lambda Legal Defense and Education Fund is a gay rights legal advocacy organization. (*See* A 672.) Parents, Families & Friends of Lesbians and Gays is a support group that seeks to counter traditional religious and moral views concerning homosexuality. (A 567, A 1030.)

3. *State Officials Remove Boy Scouts from the Campaign.* In October 1999, on the basis of the New Jersey decision later reversed by this Court in *Dale*, the Executive Director of the Connecticut Commission on Human Rights & Opportunities (the "CHRO") wrote an unsolicited letter to the Campaign Committee urging it to ask the CHRO for a

ruling on the Boy Scouts' participation in the Campaign. (A 578, A 159-60.) The Director stated that the New Jersey decision "impacts the continued participation of the Boy Scouts of America" in the Campaign, that the Boy Scouts' stance on homosexuality "may violate our antidiscrimination laws," and that allowing them in the Campaign "potentially makes the State a party to the discrimination." (A 578.)

The Campaign Committee then requested the CHRO ruling. (A 74, A 133, A 580.) Respondent Wyman, Connecticut's Comptroller and a Campaign Committee member, urged the Committee to "immediately begin to develop language for the upcoming year's application in an effort to identify and disqualify from the Campaign any charitable organization that *advances a discriminatory message or practice.*" (A 853 (emphasis added).) She explained: "If the BSA alters its position on sexual orientation . . . I would welcome it back into the Campaign." (A 853.)[2]

The CHRO issued its initial opinion on May 12, 2000, while *Dale* was still pending in this Court. (A 581-92.) The CHRO deferred formally ruling on the question whether the Scouts' policy violated State nondiscrimination law, but stated that the Scouts' participation in the Campaign

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2. The CHRO and the Campaign Committee showed much hostility to Boy Scouts' moral viewpoint. (*See* 27a; A 400 (CHRO Commissioner states that Boy Scouts' views are "illegitimate"); A 451 (CHRO Commissioner says "I take issue with an organization that almost teaches discrimination. Okay?").) Despite the fact that many charities are limited to persons of one sex, ethnicity, religion or sexual orientation, the State did not even consider removing any other group as discriminatory. (A 164-65 at 49-50, A 290 at 135, A 292 at 142-43.)

was illegal under statutes prohibiting the *State* from discriminating on the basis of sexual orientation. (A 591-92, A 585-86, 59a-61a.) The CHRO concluded that, because the Scouts' "policy of excluding homosexuals from participation violates Connecticut's Gay Rights Law . . . the Committee's inclusion of Boy Scouts member agencies in the Campaign also violates Connecticut's Gay Rights Law." (A 592.) The CHRO insisted that this same result would follow "even if the U.S. Supreme Court were to overrule *Dale* and allow the BSA to discriminate." (A 591.)

Three days after the CHRO opinion, the Chair of the Campaign Committee ordered the Scouts removed from the 2000 Campaign, without vote of the Committee.[3] (A 274 at 70, A 593-601.) Petitioners sued the officers of the State Campaign Committee on June 7, 2000. Less than three weeks later, on June 26, 2000, this Court decided *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), reversing the New Jersey decision. The Campaign Committee held an "emergency meeting" to determine the effect of *Dale*. (A 281 at 100-01.) On February 8, 2001, the CHRO ruled that *Dale* did not affect its May 2000 opinion that the Boy Scouts must be excluded from the Campaign to avoid State promotion of discrimination. (A 603-21.) However, the CHRO made no finding that Boy Scouts themselves engaged in any illegal activity.[4]

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3. Funds donated by individuals to Boy Scout councils in the past four Campaigns remain in escrow. (A 1275.)

4. In November 2000, the CHRO 1) held that the Scouts' leadership policy is protected by *Dale*, 2) held that the Scouts' employment policy would have to be examined on a case by case basis under

4. *Proceedings in the District Court.* After permitting the CHRO to intervene as a co-defendant (A 63), the district court granted summary judgment against the Boy Scouts on all claims. (35a-54a.) On the First Amendment claims, the district court recognized that the Boy Scouts' policies were "lawful and constitutionally-protected" speech under *Dale* (50a), but believed the State nonetheless could treat participation by "a known discriminator as a beneficiary" as State "furtherance" of discrimination impermissible under State law. (43a-44a.)[5]

The district court believed *Dale* inapplicable because the State was not "forcing the BSA to admit homosexuals." (48a.) The district court analyzed the case under *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), which addressed the exclusion of political and legal advocacy groups from the federal employee charitable campaign, then limited to charities engaged in "health and welfare services." The district court concluded that the Connecticut Campaign was a "nonpublic forum," and accordingly that exclusion of the Boy Scouts need only be viewpoint neutral and reasonable. (45a.) The district court believed the exclusion of the Boy Scouts did not constitute viewpoint discrimination because, even though the Boy Scouts' leadership policies were constitutionally protected, State law forbade State support of discrimination.

State law in light of BFOQ exemptions, and 3) declined to rule on the Scouts' youth leadership policy. (A 644-45.)

5. The Complaint also asserted that the State misapplied State nondiscrimination law, including law prohibiting promotion of homosexuality by the State. (A 30-32.) The State law claims are not presented in this Petition.

(48a.) The court recognized that the State excluded the Boy Scouts while at the same time including charities expressing other views on the same topics: "'groups that teach *moral values*, groups that seek to build *character*, groups that serve *youth*, groups that serve *one sex*, groups with a *religious perspective*, or groups that take a *position on the morality of homosexual conduct.*'" (49a (emphasis added).) However, the court concluded that "[t]he record does not support the BSA's intimation of discrimination by such groups." (49a.)

5. *The Opinion of the Court of Appeals.* The Second Circuit affirmed, in an opinion by Judge Guido Calabresi. (1a-34a.) The court noted that the "sole basis for the Committee's decision to remove the BSA from the Campaign" was the Boy Scouts' policy concerning homosexuality. (18a.) The Second Circuit accepted that, for purposes of summary judgment, "the removal of the BSA from the Campaign was triggered at least to some extent by the BSA's exercise of what the Supreme Court has held to be a constitutionally protected right." (18a (citing *Dale*).)

Yet the Second Circuit held *Dale* inapplicable on the ground that Connecticut's "conditioned exclusion" of the Boy Scouts from the Campaign "does not rise to the level of compulsion." (19a.) The court considered this case governed by "two lines of First Amendment cases": nonpublic forum cases (like *Cornelius*) and cases of unconstitutional conditions on benefits. (19a-20a.) The Second Circuit believed it made "no difference under which line we analyze it" because, "[w]hether viewed as denial of access to a nonpublic forum or as the denial of a government benefit, the BSA's exclusion is constitutional if and only if it was (1) viewpoint neutral and (2) reasonable." (20a.)

The court found the exclusion of the Boy Scouts to be viewpoint neutral because it was directed against the Boy Scouts' policies "as conduct, not as expression" and thus was "not obviously viewpoint discriminatory." (22a.) The court acknowledged that removing the Boy Scouts from the forum because of their stance on homosexuality imposed an "adverse impact upon a given viewpoint" (23a), but thought that this was not viewpoint discriminatory because the legislature's purpose in enacting the Gay Rights Law was to protect homosexuals from discrimination rather than to punish the Boy Scouts' viewpoint. (24a-26a.) Connecticut had not directly "prevented the BSA from exercising its First Amendment rights," but imposed a regulatory scheme under which, "as it happens, the BSA pays a price for doing so." (26a n.8.)

The court below found the Boy Scouts' selective enforcement charge "a more serious issue" (28a-29a), but believed there was no evidence from which it could be concluded that any other group participating in the Campaign also discriminated under Connecticut law (29a-30a).

Finally, the Second Circuit found exclusion of the Scouts from the Campaign to be "a reasonable means of furthering Connecticut's legitimate interest in preventing conduct that discriminates on the basis of sexual orientation." (31a.)

REASONS FOR GRANTING THE PETITION

This case presents a First Amendment issue of national importance: May a state exclude an otherwise-eligible organization from participating in a state forum or

program because of membership policies that preserve the organization's values and form the organization's expressive identity? The decision below is in direct conflict with this Court's precedents and is one of a growing number of lower court cases reaching inconsistent results.

Here, the State of Connecticut has excluded Boy Scouts from a charitable campaign in which 900 groups of all different kinds participate, solely because of Boy Scouts' constitutionally protected views and membership policies.

The Second Circuit's holding that indirect interference with rights of expressive association is permissible warrants this Court's review. The decision below conflicts with *Dale* and a long line of decisions of this Court holding that the First Amendment prohibits government from interfering with a private group's membership decisions in a manner that significantly burdens the group's message and identity. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Healy v. James*, 408 U.S. 169 (1972). The decision below would limit *Dale* to instances of direct regulation of group membership, allowing states to impose whatever other penalties they like on private expressive organizations whose beliefs and membership policies do not conform to the orthodoxies of state officials.

The court of appeals' purported bright-line distinction between direct prohibition and indirect burden also conflicts with this Court's decisions holding that government may not exclude an otherwise-qualified group from a forum or program because of the group's viewpoint,

or condition an otherwise-available benefit on abandonment of First Amendment rights. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

The decision below represents an acute threat to First Amendment principles of free speech and association and is part of a growing pattern of state agency actions and lower court decisions that have excluded the Boy Scouts, as well as traditional religious groups, from government facilities and programs because of their views and membership requirements on matters of religious belief, morality, and sexual conduct. The issue is a recurrent one on which the lower federal courts are divided and in need of guidance from this Court.[6]

A. The Decision Below Conflicts with This Court's Decisions in *Boy Scouts of America v. Dale* and Other Cases Protecting the Freedom of Expressive Association

The decision below conflicts sharply with this Court's decisions in *Boy Scouts of America v. Dale* and other cases protecting the freedom of expressive association of private, non-commercial groups.

In *Dale*, this Court held that a state may not, through its nondiscrimination statutes, prohibit the Boy Scouts from adhering to their viewpoint as expressed in their internal

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6. This case warrants plenary review. However, because *Dale* clearly applies to both direct and indirect interference with freedom of expressive association, we respectfully suggest that the Court may wish to consider summary reversal. Petitioners respectfully request that the Court invite the Solicitor General to express the views of the United States.

leadership policy. 530 U.S. at 655 (leadership policy is Boy Scouts' "method of expression"). New Jersey's application of its law was a direct regulation of the Scouts' membership: The Court noted that the law "directly and immediately affects associational rights . . . that enjoy First Amendment protection." *Id.* at 659. The Second Circuit, however, wrongly seized on this statement to justify discriminatory treatment so long as it fell short of direct interference with associational rights. This misreads *Dale*.

The Court in *Dale* stated that interference with rights of expressive association may "take many forms." *Id.* at 648. *Dale* nowhere suggested that the freedom of expressive association is limited only to cases of direct state regulation of group membership. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (required disclosure of the organization's membership lists was an unconstitutional burden on association even though the state had "taken no direct action . . . to restrict the right of members to associate freely"); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to *impose penalties or withhold benefits* from individuals because of their membership in a disfavored group." (Emphasis added)).

The Second Circuit's direct/indirect distinction is likewise in plain conflict with *Healy v. James*, 408 U.S. 169 (1972). This Court held that a state college in Connecticut had unconstitutionally interfered with a student political organization's First Amendment freedom of association by denying official recognition and access to university facilities because of the organization's affiliation with the

national Students for a Democratic Society. Noting that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs," the Court held that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right." 408 U.S. at 181. The Court squarely rejected the notion that only direct state interference with membership decisions fell within the scope of the First Amendment's prohibition:

> *[T]he Constitution's protection is not limited to direct interference with fundamental rights.* The requirement in *Patterson* that the NAACP disclose its membership list was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, *the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [State's] action.* We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'

Id. at 183 (emphasis added; citations omitted); *see id.* at 185-186 ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions *or denying rights and privileges* solely because of a citizen's association with an unpopular organization." (Emphasis added)).

The opinion below also conflicts with the unanimous decision in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995), holding that a state may not condition a veterans' parade permit on inclusion in the parade of persons whose views the veterans did not wish to have identified with their expression. In one sense, the state court order requiring plaintiffs' inclusion in the veterans' parade was a direct regulation of the veterans' expression. But *Hurley* also should be understood as a case of "conditioned exclusion": the price of a parade permit was state control over the veterans' decisions concerning who could participate. Yet this Court held that the state could not leverage permission to hold a parade into control of the content of the veterans' parade. 515 U.S. at 579-81.

Here, Connecticut cannot leverage permission to participate in the charitable Campaign into control over the internal membership policies (and thus the "method of expression" and identity) of the Boy Scouts. *Dale*, 530 U.S. at 655. Connecticut's decision to apply its Gay Rights Law in this "peculiar way" is directly contrary to "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 572-73.

In recent years, Connecticut Rivers Council and the three other local councils in Connecticut have received over $10,000 per year in earmarked and general contributions from the Campaign. (A 1026-29.) The loss of that revenue assuredly would "significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'" *Dale*, 530 U.S. at 653; *see Cornelius*, 473 U.S. at 799 ("without the funds obtained from solicitation in

various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized"). Nor does the financial penalty tell the whole story. By preventing the Boy Scouts from being listed in the Directory and soliciting contributions via the forum of the Campaign, Connecticut is directly censoring the Boy Scouts' speech – thereby imposing an intangible but substantial burden on constitutional rights of the highest order. *See Cornelius*, 473 U.S. at 799 ("The brief statements in the [Combined Federal Campaign] literature directly advance the speaker's interest in informing readers about its existence and goals."). Moreover, by ostracizing the Boy Scouts from the Campaign on the ground that it engages in "discrimination," the State has imposed an undeniable reputational stigma on the Boy Scouts. The combined effect of this triple penalty – striking as it does at the Boy Scouts' financial, expressive, and reputational interests – would "just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," 530 U.S. at 654, as did New Jersey's reinstatement order in *Dale*.

The Second Circuit's decision flouts the principles set forth in this Court's decisions in *Dale*, *Hurley*, *Roberts*, *Healy*, and *Patterson* and merits this Court's review.

B. The Decision Below Conflicts with This Court's Decisions in *Rosenberger* and Other Cases Holding That Government May Not Exclude an Otherwise-Qualified Expressive Group from a Forum or Program on the Basis of Viewpoint

The decision below conflicts with this Court's decisions forbidding viewpoint-based deprivations. Exclusion from a forum, denial of a benefit, or imposition of

a financial penalty on the basis of viewpoint violates the First Amendment. *E.g.*, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995) (viewpoint discrimination to "select[] for disfavored treatment" a student religious publication by excluding it on the basis of its religious character from a forum available to publications); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993) (viewpoint discrimination to exclude religious group because of its perspective from use of school facilities open to social and other groups, even on assumption that forum is nonpublic); *see Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (viewpoint discrimination to exclude club from use of school facilities "based on its religious nature"). The Second Circuit's decision utterly fails to distinguish these viewpoint discrimination cases.[7]

Here, it is undisputed that the Boy Scouts were excluded from the Campaign because of their views and leadership policies with respect to homosexuality. The court of appeals conceded that application of Connecticut's law had "a differential adverse impact upon a given viewpoint." (24a.) However, on the basis that the law's *purpose* was not

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7. No matter what kind of forum the Campaign is deemed to be, viewpoint-based discrimination is unconstitutional. *See Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 811. The Second Circuit characterized the Campaign as "nonpublic." (20a.) Unlike the federal campaign in *Cornelius*, however, Connecticut's Campaign does not exclude public advocacy or legal defense groups, but admits some 900 groups advocating many different views. Because Connecticut has not reserved the Campaign "for certain groups or for the discussion of certain topics," *Rosenberger*, 515 U.S. at 829 (citing *Cornelius*), the Campaign is probably better characterized as a limited public forum.

to punish viewpoints, but only to punish conduct reflecting those viewpoints, the court concluded that the law could be applied to exclude the Boy Scouts. (24a-26a.)[8]

Such an approach cannot be reconciled with this Court's decision in *Good News*. In *Good News*, the school board argued that it was permitted (or required) by state law to exclude groups using school premises for religious purposes. 533 U.S. at 107 n.2. Without inquiring into the purpose of the state law, the Court rejected this contention: "Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law." *Id.*

Similarly, *Dale* and *Hurley* looked not to the underlying purposes of the state statutes at issue, but at whether the states applied those laws so as to penalize the views of expressive groups. In *Hurley*, this Court noted that the nondiscrimination statute at issue "does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of

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8. In rejecting the selective enforcement charge, the court turned a blind eye to evidence of open hostility on the part of the Campaign Committee and the CHRO to Boy Scouts' moral view. (*See* 27a, A 400, A 451.) As the record reflects, groups such as the Stonewall Foundation would exclude from membership and employment persons who espouse the view that homosexuality is immoral. (A 352-53.) The Second Circuit's decision thus permits Connecticut to include in the Campaign groups whose membership policies express the view that homosexual conduct is morally right, while excluding groups whose membership policies express the view that homosexual conduct is morally wrong.

discriminating against individuals." 515 U.S. at 572. Nevertheless, the First Amendment was violated because the statute had "been applied in a peculiar way" to "essentially requir[e] petitioners to alter the expressive content of their parade." *Id.* at 572-73. Likewise, in *Dale*, this Court recognized that New Jersey's purpose in adopting the nondiscrimination law was "to prevent discrimination," 530 U.S. at 656, but found that New Jersey's application of the law unconstitutionally interfered with Boy Scouts' "expressive message," *id.* at 661.

That is what occurred here. The Scouts' membership policies are bound up with the Scouts' expression, as this Court recognized in *Dale*. 530 U.S. at 650-52. Lower courts may not divorce the Boy Scouts' membership policies from Boy Scouts' viewpoint, because to penalize the former is to penalize both. *See id.* at 650 (framing the issue as whether interference with membership policies "would significantly affect the Boy Scouts' ability to advocate public or private viewpoints"). To exclude the Boy Scouts from a forum based on the values they hold and the conduct they require of their members is to exclude Boy Scouts based on viewpoint and identity. That *is* viewpoint discrimination. To apply a lower standard of First Amendment analysis to an exclusion from a forum based on a membership policy presents a direct conflict with this Court's forum cases.

C. The Decision Below Conflicts with This Court's Decisions Holding That Government May Not Require Expressive Groups to Abandon First Amendment Rights As a Condition of Eligibility

The Second Circuit's decision also conflicts with numerous decisions of this Court holding that government may not condition a benefit for which a group is otherwise eligible on abandonment of First Amendment freedoms. *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 716 (1981) ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program"); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny [tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000) ("special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression").

More specifically, this Court has consistently held that a group may not be excluded on the basis of its views or expressive identity from a forum or benefit for which it otherwise qualifies. *E.g., Good News Club v. Milford Central School*, 533 U.S. 98, 106-12 (2001); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 828-37 (1995); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993); *Widmar*

v. Vincent, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972).

The Second Circuit recognized the applicability of the unconstitutional conditions doctrine, but believed that it affords less protection to the freedom of expressive association than to most other First Amendment rights. Where freedom of association is involved, the court held that government may enforce a "conditioned exclusion" from a benefit, so long as the condition is viewpoint-neutral and reasonable. (19a.) The court asserted that the unconstitutional conditions doctrine permits conditions on associational rights as long as government does not "discriminate invidiously" against particular ideas. (20a). For that proposition, the court cited *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), and *NEA v. Finley*, 524 U.S. 569 (1998), two cases involving government funding of certain types of speakers.

This plainly does not distinguish unconstitutional conditions cases. First, nothing in this Court's cases supports a lesser standard of First Amendment protection for freedom of expressive association than for other First Amendment claims. *Healy v. James*, for example, involved conditional deprivation of a benefit based on a group's expressive association. 408 U.S. at 185-86. The Second Circuit's position is also implausible: recipients of government benefits can no more be forbidden, as a condition of receiving them, from joining advocacy groups than from writing letters to the editor.

Second, the cases relied on by the Second Circuit are inapposite. This is not a case in which government employs

private speakers to carry out a government program or message. *See Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542 (2001) (funding program was "designed to facilitate private speech, not to promote a government message"); *Rosenberger*, 515 U.S. at 834 (the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers"). Here, Connecticut is not selectively funding particular groups because of their special attributes, *e.g.*, *Regan* (veterans); or for carrying a state message, *e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991); nor is it fashioning criteria for judging artistic or literary merit, *e.g.*, *Finley*. Indeed, Connecticut does not *fund* any group at all. It merely gives private groups access to the opportunity to receive charitable donations from its employees. Conditioning that access on abandonment of a group's First Amendment rights is a classic unconstitutional condition.

The Second Circuit's misinterpretation of the unconstitutional conditions doctrine has sweeping implications. If Connecticut may condition the Boy Scouts' access to the Campaign here on State control of the group's internal membership policies, any state may similarly condition access to any state program or benefit: social services, welfare, housing, use of public facilities, even tax-exempt status. The decision below furnishes hostile state officials with a roadmap for circumventing *Dale* and eviscerating freedom of association. The State cannot be permitted thus to accomplish through the back door of "conditioned exclusion" what it could not do through the front door of direct regulation.

D. This Case Presents a Recurring First Amendment Issue of National Importance, Affecting the Rights of Boy Scouts and Religious Charities Nationwide

The decision below licenses state and local governments to punish the Boy Scouts for their views and threatens the First Amendment rights of all expressive associations, and especially religious groups, to maintain and adhere to their convictions on moral or religious issues without being "select[ed] for disfavored treatment" at the hands of state government. *Rosenberger*, 515 U.S. at 831.

1. In the words of one district court, "lawsuits like this one are the predictable fallout from the Boy Scouts' victory before the Supreme Court." *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1263 (S.D. Cal. 2003). But while these cases may be predictable – and while the Boy Scouts vigorously contest them – their cumulative impact threatens seriously to undermine Boy Scouts' ability to carry out their associational mission. In addition to Connecticut, local governments in Florida and California, while recognizing that after *Dale* they cannot outlaw the Boy Scouts' membership policies, have instead invoked ordinances prohibiting discrimination on the basis of sexual orientation to justify excluding the Boy Scouts from public facilities.

a. *Barnes-Wallace v. Boy Scouts of America*: In *Barnes-Wallace*, private plaintiffs (a lesbian couple, an agnostic couple and their respective minor sons) persuaded the district court to hold that San Diego had violated the Establishment Clause by having entered into a long-term lease of campgrounds with the local Boy Scout council. The lease in question is part of a City program in which the City

leases property to over 100 secular and religious nonprofits in return for community service. The City's leases require the Boy Scouts to build and administer campgrounds and recreational facilities available to the entire San Diego community on a first-come first-served basis at no expense to the City. In return, Boy Scouts are allowed to maintain an office as well as meet and camp on the site with the rest of the community. Relying on the Second Circuit's decision in the present case, the district court held, on partial summary judgment, that "[t]he government's decision to exclude organizations with discriminatory membership policies is viewpoint neutral when the purpose for the decision is to protect persons from the effects of discrimination and not to exact a price for the organization's protected expression." 275 F. Supp. 2d at 1287.

b. *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002): The City of Berkeley for many years has permitted nonprofit groups to berth their boats rent-free at the City marina. After 60 years, Berkeley excluded Sea Scouts on the ground that Boy Scouts of America's internal membership policies discriminate on the basis of sexual orientation. The California Court of Appeal rejected the Sea Scouts' First Amendment challenge on the ground that they "remained free to exercise their First Amendment rights, and berth their boats at the marina, albeit without a city subsidy. Berkeley's actions have not required appellants to stop discriminating in these regards, which they remain free to do." 127 Cal. Rptr. 2d at 702. The Sea Scouts must now pay the City $5000 per year in berthing fees. An appeal is currently pending before the California Supreme Court. No. S11261 (Cal. March 26, 2003).

c. *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001): The local Boy Scout council in Broward County, Florida for many years had been permitted to make after-hours use of public school facilities. However, in the aftermath of this Court's decision in *Dale*,

> the School Board . . . concluded that *the Scouts are ineligible to rent and lease school facilities like any other private group* because the Scouts' membership policies discriminate on the basis of sexual orientation, and therefore violate the School Board's anti-discrimination policy.

136 F. Supp. 2d at 1297 (emphasis added). Had the School Board's decision been permitted to stand, the impact on local, urban and economically disadvantaged Scouts – who had been forced either to drop out or to travel to less convenient locations for meetings – would have been severe. Unlike the courts below, however, the district court in *Till* found it obvious that the Scouts were being excluded from school facilities because of "the exercise of" their "First Amendment right to freedom of expressive association." *Id.* at 1308. Accordingly, the district court held that the School Board acted unconstitutionally by "excluding the Boy Scouts from Broward school facilities based on their anti-gay viewpoint." *Id.* at 1310-11.

The current cases against Boy Scouts underline the vital importance of this Court's long-standing teaching that First Amendment freedoms of speech and expressive association are "'protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy*, 408 U.S. at 183

(quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). In reality, there is little practical difference between a "direct" prohibition enforced by a fine, and imposition of an "indirect" burden in the form of penalty or exclusion. For example, the "indirect" burden on the Boy Scouts of losing its leases in San Diego far exceeds any ordinary civil fine in impact. Yet, according to the Second Circuit, although San Diego could not fine the Boy Scouts $1000 for adhering to their leadership policy, it could rescind their 25 year lease.

2. The importance of the decision below extends far beyond its impact on the Boy Scouts. The issue of what type of constitutional scrutiny applies to the "conditioned exclusion" of an expressive group from a government forum because of the group's views and membership criteria is not confined to the Boy Scouts and the Connecticut Campaign. First, there are 150 charitable campaigns run by states, public universities, and local governments. More than 140,000 charities participate. Some campaigns explicitly exclude religious charities because of their religious viewpoint. *E.g.*, Ala. Code § 36-1A-5(b)(4) (2003) (excluding "religious activities" from "basic health and human care service" in the Alabama State Employee Combined Charitable Campaign); 5:4 Del. R. 976, Exec. Order No. 20, § II(L)(2) (Oct. 1, 2001) (excluding organizations "with programs which exist solely to advocate particular religious or ethical beliefs"); Fla. Stat. Ann. § 110.181(1)(h)(2) (West 2003) (excluding organizations "whose activities are primarily political, religious, professional, or fraternal in nature"); Ga. Code Ann. § 45-20-51(2)(E) (West 2003) (excluding "religious organization" from the definition of "charitable organization," with exceptions); Wash. Rev. Code

§ 19.09.020 (2002) (excluding "religious or political activities" from definition of "charitable organization").

Second, government officials of all kinds – state officers, state university officials, school boards – are excluding religious and other groups from access to forums or programs for which they are otherwise eligible, on account of their religious or moral values and their efforts to maintain their distinctive identities. For example, high school student religious groups, entitled to meet along with other student groups during noninstructional time pursuant to the Equal Access Act (20 U.S.C. §§ 4071-4074) and *Westside Board of Education v. Mergens*, 496 U.S. 226 (1990), have faced "conditioned exclusion" based on their religious identity and membership policies. *See, e.g., Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (CA2), *cert. denied*, 519 U.S. 1040 (1996) (school district may condition student religious group meetings on interference with group's choice of officers in some circumstances); Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & Religion 187, 224-25 (2001); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996). Officials at many state university campuses have likewise sought the "conditioned exclusion" of student religious groups from forums or benefits. *See* Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (1994); Paulsen, *supra*, at 668-72.

All too many state officials are hostile both to the First Amendment rights of dissenting groups and to this Court's decisions in *Dale*, *Rosenberger*, and *Good News*. The Second Circuit's decision in this case, absent this Court's review, would empower state officials to retaliate against groups whose views and internal membership practices they find objectionable.

E. The Decision Below Conflicts with Decisions of Other Lower Courts

In addition to the conflict with this Court's decisions, the decision below conflicts with the decisions of other federal courts.

1. Two circuits have treated the Ku Klux Klan much more generously than the Second Circuit has treated the Boy Scouts. The Fifth and Eighth Circuits have required the inclusion of the Klan in state forums, holding that a state's exclusion of an otherwise-eligible expressive association on the basis that its viewpoint is discriminatory violates the First Amendment: *Cuffley v. Mickes*, 208 F.3d 702 (CA8 2000), *cert. denied*, 532 U.S. 903 (2001); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (CA5 1978).

In *Cuffley*, the Missouri Highway and Transportation Commission denied the Klan's petition to participate in its Adopt-A-Highway program. The Eighth Circuit held that Missouri had no legitimate, viewpoint-neutral reason for excluding the Klan from the program. Missouri had argued, *inter alia*, that it could exclude the Klan from the Adopt-A-Highway program because the Klan's membership policies

are discriminatory, even if it could not directly compel the Klan to abandon those policies. 208 F.3d at 707-08.

The Eighth Circuit assumed *arguendo* that the Klan's membership policies, which "discriminate[] . . . on the basis of race, religion, color, and national origin," violated State nondiscrimination laws. *Id.* at 708. Relying on *Roberts*, the Eighth Circuit reasoned that "direct application" of a nondiscrimination law to "requir[e] the Klan to accept non-'Aryans' would significantly interfere with the Klan's message of racial superiority and segregation," and "violate the Klan's freedom of political association." *Id.* Missouri's indirect pressuring of the Klan to change its message, however, would have the same effect: "Requiring the Klan essentially to alter its message of racial superiority and segregation by accepting individuals of other races, religions, colors, and national origins in order to adopt a highway would censor its message and inhibit its constitutionally protected conduct." *Id.; see id.* at 709 ("[T]he State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association."). That holding unmistakably conflicts with the Second Circuit's holding that Connecticut's exclusion of the Boy Scouts does not infringe their expressive association because "conditioned exclusion does not rise to the level of compulsion." (19a.)

Similarly, in *Knights of the Ku Klux Klan*, the Fifth Circuit held that a school board could not exclude the Klan from after-hours use of school facilities. The Fifth Circuit concluded that a preliminary injunction should issue against the school board's "selective denial of a dedicated public

forum to a group because of its ideas or membership policies." 578 F.2d at 1128.

2. Other circuits similarly have held that speakers or groups may not constitutionally be excluded from government forums for no other reason than government disagreement with their viewpoints: *Brown v. California Department of Transportation,* 321 F.3d 1217, 1221-25 (CA9 2003) (state's policy of allowing American flag to hang on highway overpass fence, a nonpublic forum, while removing displays with "unpatriotic" messages was not reasonable or viewpoint neutral); *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (CA4 2002) (state's special license plate program was a nonpublic forum and thus constituted private, rather than government, speech, as to which viewpoint discrimination was impermissible); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1548-50 (CA11 1997) (state law prohibiting any state college or university from spending funds to sanction, recognize, or support any group that promotes homosexuality was viewpoint discriminatory when groups with other viewpoints were allowed to be funded).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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